LIBRARY
SUPREME COURT, U. S.

FILED
JAN 19 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1071

HAROLD KONIGSBERG,

Petitioner,

—v.—

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER and RAMSEY CLARK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDICES TO THE PETITION FOR CERTIORARI

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006,
Counsel for the Petitioner.

FRANK A. LOPEZ,
44 Court Street,
Brooklyn, N. Y. 11201,
Of Counsel.

INDEX TO APPENDIX

	PAGE
Appendix A—Opinion below	1a
Appendix B—Judgment below	8a
Appendix C—Statutes involved	9a
Appendix D—Certification of Petitioner's Incompetency	17a
Appendix E—Telegram Directing Petitioner's Removal	19a

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,326

HAROLD KONIGSBERG,

Appellant,

vs.

PASQUALE J. CICCONE, M.D., etc., et al.,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

[October 24, 1969.]

Before MEHAFFY and GIBSON, Circuit Judges and MILLER, Senior District Judge.

MEHAFFY, Circuit Judge.

Harold Konigsberg, petitioner, an inmate of the Medical Center for Federal Prisoners at Springfield, Missouri, appeals from an order denying his application for a writ of habeas corpus. He is serving a 10-year sentence imposed in 1963 by the United States District Court of New Jersey following a jury trial. In 1964, after serving a state sentence, petitioner was imprisoned in the Federal Correctional Institution at Danbury, Connecticut. On August 31, 1965, upon direction of the Attorney General petitioner was transferred to the Springfield, Missouri institution pursuant to 18 U.S.C. § 4082.

Appendix A

In a full evidentiary hearing on petitioner's application conducted by The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, Western Division, petitioner was allowed to present and fully develop twenty grievances and conditions, most of them asserted to be violative of his constitutional rights. Judge Hunter found some merit to a few of petitioner's charges; but in an exhaustive order reported at 285 F. Supp. 585 (W.D. Mo. 1968), aside from specifically ordering respondent Ciccone to take certain actions relating to attendance at religious services, Judge Hunter denied the writ. We affirm.

A detailed statement of petitioner's numerous contentions is unnecessary and would be repetitious in light of Judge Hunter's elaborate treatment of the matter. In his brief before us, petitioner capsulized into five assignments of error his argument for reversal asserted to be violative of his constitutional rights.

The point that merits our most careful consideration is the serious charge that the district court should have vacated a New York state conviction because it resulted from an illegal transfer of petitioner from the Medical Center in Springfield to New York to stand trial while he was certified as insane under § 4241 and that this action violated his Fifth, Sixth and Eighth Amendments rights under the Constitution.

In September, 1965, petitioner was examined by the Board of Examiners of the Medical Center in Springfield, Missouri, pursuant to § 4241. The Board reported to the Attorney General that petitioner was of unsound mind on November 16, 1965, and the Attorney General caused an order of certification of insanity to issue on April 5, 1966. In October, 1966, the Attorney General authorized the removal of petitioner to New York to stand trial for extortion and related counts on a writ of habeas corpus *ad*

prosequendum. At the New York state trial petitioner was convicted and sentenced to a term of 33 to 40 years.

Petitioner contends that his "release" to the New York state authorities on the writ was an illegal action vitiating his state court conviction and sentence. He was not actually released but was housed under federal authority as a federal prisoner and accompanied by a federal marshal at all pertinent times. Upon conclusion of the New York trial, he was returned to the Medical Center at Springfield. It is argued that the Attorney General lacked authority to allow him to be tried on the state offense prior to a decertification indicating that he had been restored to sanity or health. On August 21, 1967, after his return to Springfield, petitioner's administrative status was changed to that of a sane person requiring medical care and treatment not available in an existing penal institution.

Petitioner relies principally upon *Weldon* v. *Steele*, 125 F. Supp. 667 (W.D. Mo. 1954), where the court construed § 4241 as it related to another question. The issue there was whether the failure of the Attorney General to provide in his commitment order that the prisoner was to be held until the maximum sentence was served, without credit for good time or commutation, resulted in allowing good time to accrue to the prisoner while he was confined under § 4241. The court held that, since the statute provides for the loss of good time during a § 4241 commitment, the Attorney General could not waive the statute so as to permit the prisoner to be credited with good time. This case is clearly inapposite and has no bearing on the question for our determination.

Under 18 U.S.C. § 4085 the Attorney General has the authority to permit a prisoner under a federal sentence to be taken from the institution where he is confined to be tried in a state court. The exercise of this authority is discretionary, however, and the Attorney General need not transfer a prisoner. This was practiced as a matter

of comity prior to the enactment of the statute. *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922). Under 28 C.F.R. § 0.96, "the Director of the Bureau of Prisons is authorized to exercise or perform any of the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons (including insane prisoners and juvenile delinquents) charged with or convicted of offenses against the United States. . . ." Section 4082 provides that the Attorney General may designate the place of confinement and may at any time transfer a person from one place of confinement to another. This has been construed to apply to patients in medical centers as well as other institutions. *Holland* v. *Ciccone*, 386 F.2d 825 (8th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968). The court in Holland said at page 827:

> "But this court more than once has held that 18 U.S.C. § 4082, and its companion sections, place responsibility upon the Attorney General and not upon the courts to designate the place at which a convicted prisoner shall serve his sentence and receive medical treatment, if any is needed, and that the administrative determination of this issue is not subject to review in a habeas corpus proceeding. (Citing cases.) The administrative decision, once made, and in the absence of a showing of arbitrariness or capriciousness, is conclusive."

In *Garcia* v. *Steele*, 193 F.2d 276, 278 (8th Cir. 1951), the late Judge Sanborn, speaking for this court, said:

> "It is our opinion that the authority to classify federal prisoners for the purposes of confinement, care and treatment, has been conferred exclusively upon the Attorney General, and that his determinations, made in the exercise of that authority, are not subject to review in habeas corpus proceedings."

Appendix A

The fact that petitioner had not been decertified by authorities at the Medical Center at the time he was examined in the state court on the issue of insanity does not infringe upon his rights since the certification did not prove, in itself, that he was not competent to stand trial. In *McIntosh* v. *United States,* 176 F.2d 514 (8th Cir. 1949), *cert. denied,* 338 U.S. 876 (1949), McIntosh was serving a sentence in the United States Penitentiary at Terre Haute, Indiana when he was certified as insane and was sent by the Attorney General to the Medical Center at Springfield. About four months after he arrived there—and while he was still certified as insane—he escaped and stole a plane to make his getaway. Subsequently he was tried and convicted of this offense, and we affirmed on appeal.

Even if petitioner had been decertified by the Medical Examiner at Springfield, the question of his competency to stand trial in a state court, as well as his competency at the time of the commission of the offense, was a matter for the state court and the conviction is not to be set aside unless clearly arbitrary or unwarranted. *Butler* v. *United States,* 384 F.2d 522, 523 (8th Cir. 1967), *cert. denied,* 391 U.S. 952 (1968). And since the state court made the determination that he was competent to stand trial, he was not denied any of his constitutional rights by reason of the fact that he had not previously been certified sane by the Medical Center.

In the determination of the competency of an accused, the certification by the hospital or the medical testimony itself is not the decisive factor and is not binding on the triers of fact. *Feguer* v. *United States,* 302 F.2d 214, 236 (8th Cir. 1962), *cert. denied,* 371 U.S. 872 (1962). The finding by the court, whether state or federal, is the determinative finding. *Gunther* v. *United States,* 215 F.2d 493 (D.C. Cir. 1954). In *Gunther,* the court said:

> "While the judge may be assured of such a person's competency without a full-scale hearing, . . . [it is] clear that neither a doctor's certificate nor other 'medical testimony' was contemplated as a substitute for the essential 'finding of the court.'" (215 F.2d at 496).

Neither did the manner in which petitioner was brought before the state court deprive it of jurisdiction to try him. In *Frisbie* v. *Collins*, 342 U.S. 519 (1952), the Court held that the power of a court to try a person for a crime is not impaired by reason of the fact that he is brought within the court's jurisdiction by forceful abduction.[1]

There are many forms and degrees of insanity. While a person might have a mental disorder which indicated that treatment in a mental institution was desirable, yet he could be at the same time entirely competent to stand trial for a criminal offense.[2]

For the reasons above stated, we find that petitioner is not entitled to habeas relief and we are not authorized

---

[1] *Frisbie* v. *Collins*, 342 U.S. 519 (1952), was quoted with approval in *Sewell* v. *United States*, 406 F.2d 1289, 1292-1293 (8th Cir. 1969). See also and compare *Hunt* v. *Eyman, Warden*, 405 F.2d 384 (9th Cir. 1968), *cert. denied*, 394 U.S. 1020 (1969); *O'Shea* v. *United States*, 395 F.2d 754 (1st Cir. 1968); *McCord* v. *Henderson*, 384 F.2d 135 (6th Cir. 1967).

[2] The court in *Johnson* v. *United States*, 344 F.2d 401, 406 (5th Cir. 1965), said:

> "Since there are many shades and phases of mental disorders as well as degrees of severity, and since the law—especially criminal law—attaches different consequences to the presence of a particular mental disorder in a defendant at different stages of the trial process, the Judge's order should indicate the distinctive medico-legal issues involved."

to vitiate the New York state conviction by reason of petitioner's transfer under the circumstances that existed. Furthermore, no facts were adduced in the district court to indicate that petitioner's trial was tainted by the pretrial transfer and, therefore, no relief is warranted. *Sheldon* v. *State of Nebraska*, 401 F.2d 342 (8th Cir. 1968). As a matter of fact, petitioner's constitutional right to have a speedy trial was protected by the action of the Attorney General in making the trial possible.

We have considered the other assignments relied upon by petitioner in this appeal which related to his asserted mistreatment; the withholding of his property by the Government; and the denial of access to the courts and counsel, and are in complete agreement with Judge Hunter's aforementioned published opinion and order, and for that reason adopt that opinion and order insofar as it relates to these other issues.

The order of the district court denying issuance of a writ of habeas corpus is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19326 September Term, 1969

Appeal from the United States District Court
for the Western District of Missouri.

HAROLD KONIGSBERG, *Appellant*

—VS.—

PASQUALE J. CICCONE, M.D., Director of the Medical Center, Springfield, Mo., MYRL E. ALEXANDER, Director, Bureau of Prisons, U. S. Department of Justice, Washington, D.C., The Attorney General of the United States, Washington, D.C., the United States Attorney for the Western District of Missouri, and any person having the custody or control of the prisoner Harold Konigsberg,
Appellees.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court denying petition for writ of habeas corpus be, and is hereby, affirmed.

October 24, 1969

APPENDIX C

STATUTES INVOLVED

1. The pertinent portions of Title 18, U.S.C., provide as follows:

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

* * * * *

[Subsections (d) through (f) omitted because not pertinent.]

§ 4085. Transfer for state offense; expense

(a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction,

cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

* * * * *

§ 4241. Examination and transfer to hospital

A board of examiners for each Federal penal and correctional institution shall consist of (1) a medical officer appointed by the warden or superintendent of the institution; (2) a medical officer appointed by the Attorney General; and (3) a competent expert in mental diseases appointed by the Surgeon General of the United States Public Health Service.

Such board shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.

The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against

the United States, there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served.

§ 4242. Retransfer upon recovery

An inmate of the United States hospital for defective delinquents whose sanity or health is restored prior to the expiration of his sentence may be retransferred to any penal or correctional institution designed by the Attorney General, there to remain pursuant to the original sentence, computing the time of his detention or confinement in said hospital as part of the term of his imprisonment.

§ 4243. Delivery to state authorities on expiration of sentence

The superintendent of the United States hospital for defective delinquents shall notify the proper authorities of the State, Territory, District, or Possession where any insane prisoner has his legal residence, or, if this cannot be ascertained, the proper authorities of the State, Territory, District, or Possession from which he was committed, of the date of expiration of sentence of any prisoner who, in the judgment of such superintendent, is still insane or a menace to the public. Such superintendent shall cause such prisoner to be delivered into the custody of the proper authorities of such State, Territory, District or Possession.

Statutes Involved

§ 4244. Mental incompetency after arrest and before trial

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrists indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that

the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

§ 4245. Mental incompetency undisclosed at trial

Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in Title 18, United States Code, Section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of Section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial.

§ 4246. Procedure upon finding of mental incompetency

Whenever the trial court shall determine in accordance with Sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the

Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding Sections 4244 and 4245 shall determine that the conditions specified in the following Section 4247 exist, the commitment shall be governed by Section 4248 as herein provided.

§ 4247. Alternate procedure on expiration of sentence

Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in Title 18, United States Code, Section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, holding a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissible in evidence. All of the psychiatrists and members of the board who have

examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examination by the prisoner or on behalf of the Government. At such hearing the court may in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative.

§ 4248. Termination of custody by release or transfer

Whenever a person shall be committed pursuant to Section 4247 of this title, his commitment shall run until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur. Whereupon the Attorney General or his authorized representative shall file with the court which made said commitment a certificate stating the termination of the commitment and the ground therefor: *Provided, however,* That nothing herein contained shall preclude a prisoner committed under the authority of Section 4247 hereof from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus. The Attorney General or his authorized representative shall have authority at any time to transfer a prisoner committed to his custody under the authority of Section 4246 or Section 4247 hereof to the proper authorities of the State of his residence.

Statutes Involved

2. Section 2243 of Title 28, U.S.C., provides as follows:

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

APPENDIX D

CERTIFICATION OF APPELLANT'S INCOMPETENCY

UNITED STATES DEPARTMENT OF JUSTICE
MEDICAL CENTER FOR FEDERAL PRISONERS
Springfield, Missouri

November 16, 1965

To the Attorney General

SIR:

In accordance with existing law the undersigned Board of Examiners hereby certify that upon examination of the prisoner below-named we have found him to be of unsound mind, as more fully appears in the medical report attached. Accordingly, we recommend detention of the said prisoner at the Medical Center for Federal Prisoners at Springfield, Missouri.

Name Konigsberg, Harold

Offense Poss. of Goods Stolen from I/S Shipment

District convicted New Jersey—Newark

Date of sentence 11-19-64—Custody

7-16-62—Stay on appeal

No. 15826-H

Legal residence Bayonne, N. J.

Term of sentence 10 years

Maximum expiration 11-16-74

AMOS HILDRETH, M.D.
(Representing Warden)

SAMUEL DUBIN, M.D.
(Representing Surgeon General, USPHS)

HOWARD C. WILINSKY, M.D.
(Representing Attorney General of the U.S.)

11-16-65—Board of Examiners
Date

Appendix D—Certificate of Appellant's Incompetency

ORDER TO WARDEN

It appearing by the certification of the board of Examiners that the above-named prisoner is a suitable subject for detention at the Medical Center for Federal Prisoners at Springfield, Missouri, and it having been decided to detain him at the said Center pursuant to law, now.

1. You, the Warden of the Medical Center are hereby authorized and directed to execute this order by detaining said prisoner, together with the original order of commitment, medical certificate, and other official papers at the said Medical Center for Federal Prisoners and to incur the necessary expense and include it in your regular accounts.

2. You, the Warden of said Medical Center for Federal prisoners, are hereby authorized and directed to safely keep said prisoner in your custody pending further orders from the undersigned or until the maximum sentence without credit for good time or commutation, shall have been served.

For the Attorney General,

s/ MYRL E. ALEXANDER
Director

Pursuant hereunto, I have this
day executed the above order.
4/5/66

APPENDIX E

TELEGRAM DIRECTING APPELLANT'S REMOVAL

Telefax WESTERN UNION *Telefax*

739 CSY SEP 19 66 KA461
K LLC249 GOVT PD 2 EXTRA TDK PWS WASH DC 19 512P CST

DIR MEDICAL CENTER, FOR FED PRISONERS SPRINGFIELD MO

PASS TO FOR ACTION ANTHONY R. MARASCO U S MARSHAL NEW YORK NY

PASS TO INFO TO DIR MEDICAL CENTER FOR FED PRISONERS SPRINGFIELD MO INF TO FRANCIS M. WILSON US MARSHAL KANSAS CITY MO YOU ARE AUTHORIZED TO EXECUTE PROPER WRIT OF HABEAS CORPUS AD PROSEQUENDUM FOR PRODUCTION OF HAROLD KONIGSBERG, # 15826-M, FROM THE MEDICAL CENTER FOR FEDERAL PRISONERS, SPRINGFIELD, MISSOURI TO STATE COURT FOR SOUTHERN DISTRICT, MANHATTAN, NEW YORK ON SEPTEMBER 28, 1966 TO BE SUBJECT TO PROVISIONS OF 720.04 OF THE MARSHALS MANUAL. DIRECTOR AT SPRINGFIELD IS AUTHORIZED TO HONOR WRIT

C R HAGAN ASST DIR BUR OF PRISONS

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 13 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1071

HAROLD KONIGSBERG, *Petitioner,*

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER and RAMSEY CLARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

FRANK A. LOPEZ,
44 Court Street,
Brooklyn, N. Y. 11201,
Of Counsel.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	10
Appendices—separately bound:	
Appendix A—Opinion below	1a
Appendix B—Judgment below	8a
Appendix C—Statutes involved	9a
Appendix D—Certification of petitioner's incompetency	17a
Appendix E—Telegram directing petitioner's removal	19a

AUTHORITIES

CASES:

Ableman v. *Booth*, 21 How. 506	9
Cook v. *Hart*, 146 U.S. 183	8
Eastern R. Conf. v. *Noerr Motors*, 365 U.S. 127	7
Frisbie v. *Collins*, 342 U.S. 519	8
Greenwood v. *United States*, 350 U.S. 366	7
Ex parte Johnson, 167 U.S. 120	8
Jones v. *Cunningham*, 371 U.S. 236	9
Ker v. *Illinois*, 119 U.S. 436	8
Konigsberg v. *Ciccone*, 285 F. Supp. 585	4
Konigsberg v. *Clark*, No. 802, this Term	4
Konigsberg v. *United States*, C.A. 3, No. 17882, Nov. 28, 1969	4
Lascelles v. *Georgia*, 148 U.S. 537	8
Lynch v. *Overholser*, 369 U.S. 705	7
Machinists v. *Street*, 367 U.S. 740	7
Mahon v. *Justice*, 127 U.S. 700	8

Page

Pate v. *Robinson*, 383 U.S. 375 8
Pettibone v. *Nichols*, 203 U.S. 192 8
Peyton v. *Rowe*, 391 U.S. 54 9
Ponzi v. *Fessenden*, 258 U.S. 254 5
Smith v. *Hooey*, 393 U.S. 374 10
Tarble's Case, 13 Wall. 397 9
United States v. *Jackson*, N.D. Calif., No. 41713 Crim., Nov. 13, 1969 7
United States v. *Konigsberg*, 336 F. 2d 844, certiorari denied, 379 U.S. 933 2
Weldon v. *Steele*, 125 F. Supp. 667 7

STATUTES:

Act of May 13, 1930, Sec. 6, c. 254, 46 Stat. 270, 271 .. 6
Act of April 30, 1940, c. 176, 54 Stat. 175 5
18 U.S.C. ch. 313, Mental Defectives 4, 6, 7
18 U.S.C. §4082 .....3, 9a
18 U.S.C. §4085 .....2, 5, 9a
18 U.S.C. §§4241-4248 5
18 U.S.C. §§4244-4248 7
18 U.S.C. §4241 .....2, 3, 6, 7, 9, 10a
18 U.S.C. §4242 .....7, 11a
18 U.S.C. § 4243 .....7, 11a
18 U.S.C. § 4244 .....7, 12a
18 U.S.C. §4245 ..... 13a
18 U.S.C. § 4246 .....7, 13a
18 U.S.C. §4247 .....7, 14a
18 U.S.C. §4248 .....7, 15a
28 U.S.C. §2243 .....9, 16a
28 U.S.C. §2255 4

MISCELLANEOUS:

H. R. Rep. 102, 71st Cong., 1st sess. 6
H. R. Rep. 1885, 76th Cong., 3d sess. 5
S. Rep. 1410, 76th Cong., 3d sess. 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

HAROLD KONIGSBERG, *Petitioner,*

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER and RAMSEY CLARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HAROLD KONIGSBERG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on October 24, 1969.

OPINIONS BELOW

The opinion of the district court is reported at 285 F. Supp. 585. The opinion of the court below (Appendix A, *infra,* pp. 1a-7a) is reported at 417 F. 2d 161.[1]

---

[1] Pursuant to Rule 23(1)(i), all of the Appendices to this petition have been separately bound.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. 8a) was entered on October 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, when a Federal prisoner has been certified pursuant to 18 U.S.C. § 4241 as being of unsound mind and has been sent to the Medical Center for Federal Prisoners for further confinement as provided therein, "until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence * * * shall have been served," the Attorney General nonetheless has power under 18 U.S.C. § 4085 to transfer such prisoner to State authorities for trial in a State court while such certification is still in effect.

2. Whether the doctrine that the power of a State court to try a person in actual State custody is not impaired by the means by which such person is brought within the State court's jurisdiction has any application to a Federal prisoner who was never actually released to State custody, but was at all times during his trial in the State court housed under Federal authority as a Federal prisoner, accompanied by a Federal marshal at all pertinent times, and then returned to Federal prison at the conclusion of his State trial.

STATUTES INVOLVED

The statutes involved are set forth in Appendix C, *infra*, pp. 9a-16a.

STATEMENT

The facts of this case are few, simple, and undisputed.

Petitioner is serving a 10-year sentence adjudged in the United States District Court for the District of New Jersey and thereafter affirmed on appeal. *United States* v. *Konigsberg*, 336 F. 2d 844 (C.A. 3), certiorari denied, 379 U.S. 933.

Following commitment in the Federal Correctional Institution at Danbury, Connecticut, in 1964, he was, in August 1965, transferred to the Medical Center for Federal Prisoners on direction of the Attorney General pursuant to 18 U.S.C. § 4082 (*infra,* Appendix C, p. 9a).

Shortly thereafter, pursuant to 18 U.S.C. § 4241 (*infra,* Appendix C, pp. 10a-11a), petitioner was examined by the Board of Examiners at that institution. This Board on November 16, 1965, reported to the Attorney General that he was of unsound mind (Appendix D, *infra,* at p. 17a), and the Attorney General caused an order of certification of insanity to issue on April 5, 1966 (*ibid.* at p. 18a).

Thereafter, in October 1966, while the foregoing certification was in full force and effect, the Attorney General authorized petitioner's removal to New York on a writ of habeas corpus *ad prosequendum* to stand trial for extortion and related counts (Appendix E, *infra,* p. 19a). Petitioner was not actually released to State custody, but was housed under Federal authority as a Federal prisoner and was accompanied by a Federal marshal at all pertinent times (*infra,* p. A3).

At the ensuing New York trial in the State court petitioner was convicted and sentenced to a term of 33 to 40 years. At the conclusion of that trial, he was returned to the Medical Center at Springfield. Thereafter, on August 21, 1967, following a decertification five days earlier, petitioner's administrative status was changed to that of a sane person requiring medical care and treatment not available in an existing penal institution (Response to Order to Show Cause, dated Sept. 6, 1967, par. 7).

Petitioner then brought a petition for a writ of habeas corpus in the United States District Court for Western Missouri, asserting numerous grounds for relief, the only one now material being that the Attorney General lacked authority to allow him to be tried for the State offense prior to a decertification indicating that he had been restored to

sanity or health, and that the New York conviction should accordingly be vacated. Relief on that ground was denied, *Konigsberg* v. *Ciccone,* 285 F. Supp. 585, 601-602, and petitioner appealed.

The court below held that it had no authority to vacate petitioner's conviction by the court of New York State, held that certification at the Medical Center would not in itself prove his later incompetency at the trial, and, without addressing itself specifically to the question whether the Attorney General's power to release a Federal prisoner to a State was qualified by any of the provisions of Chapter 313 of Title 18, U.S.C., Mental Defectives, affirmed the ruling below.

Certain collateral proceedings should be briefly mentioned.

1. Petitioner's direct appeal from his New York conviction is now pending in the Appellate Division of the New York Supreme Court for the First Department; it has not yet been argued.

2. Before his New York trial commenced, petitioner sought habeas corpus relief in the United States District Court for the Southern District of New York. *Konigsberg* v. *Clark,* 66 Civil 4150, filed December 5, 1966. Relief was denied, and an appeal to the Second Circuit was eventually dismissed for want of prosecution. See No. 802, this Term, seeking certiorari to review that dismissal. The record in that case does not reflect the facts concerning the present petitioner's continuous Federal custody in the course of his State prosecution that are set forth in the opinion below in this case (*infra,* p. 3a).

3. As a matter of completeness, although this third proceeding is quite irrelevant to the issues canvassed here, it should be noted that, on November 28, 1969, the Third Circuit affirmed the denial of petitioner's motion under 28 U.S.C. § 2255 to vacate the sentence under which he is now in custody. *Kongisberg* v. *United States,* No. 17882.

REASONS FOR GRANTING THE WRIT

This case presents two vitally important questions.

The first concerns the power of the Attorney General of the United States to transfer to a State for prosecution a Federal prisoner concerning whom there is in effect an unrevoked statutory determination that he is of unsound mind.

The second is whether such transferred prisoner was ever in State custody as a matter of law when in fact he was never released but continued in actual Federal custody throughout the State trial, after which he was returned to the Federal prison whence he was originally removed and where he still remains.

First. Even before there was express authority to turn over a Federal prisoner for State prosecution, inherent power to do so existed "except when special statutes make an exception." *Ponzi* v. *Fessenden,* 258 U.S. 254, 264. The present express transfer authority, 18 U.S.C. § 4085 (Appendix C, *infra,* pp. 9a-10a), on which both courts below relied (285 F. Supp. at 601-602; Appendix A, *infra,* pp. 3a-4a), does not purport to override the statutory provisions for mental defectives (18 U.S.C., ch. 313, §§ 4241-4248, Appendix C, *infra,* pp. 10a-15a); and the committee reports on the Act of April 30, 1940, c. 176, 54 Stat. 175, from which § 4085 was drawn, show that the principal reason for its enactment was to relieve the demanding State from making the wholly artificial showing that the Federal prisoner it sought to prosecute was a "fugitive from justice" so as to be subject to formal extradition.[2]

---

[2] See H.R. Rep. 1885 and Sen. Rep. 1410, both 76th Cong., 3d Sess. The latter, though identical in substance is slightly more ssuccinct; it states:

> "The necessity for the enactment of this measure arises in the interpretation of the word 'fugitive' under extradition laws. It has been gravely doubted, even to the extent that requests for extradition have been refused, that a prisoner taken from one State to another for purposes of incarceration

Once the scheme of Chapter 313 is looked to, it is plain that no statute contemplates giving the Attorney General power to transfer for State prosecution a Federal prisoner formally declared incompetent under the statutory provision for such declarations.

Section 4241, which has remained unchanged since its enactment in 1930 (Section 6 of the Act of May 13, 1930, c. 254, 46 Stat. 270, 271), provides that (*infra*, at p. 11a) a prisoner so declared to be of unsound mind shall be "kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served." [3]

---

in a Federal institution is a fugitive in the sense that his removal is an involuntary one. The bill would allow a prisoner to be taken to a State where he is wanted so that on his release there he would be subject to the State authorities. The Attorney General has recommended the enactment of the bill."

[3] See H.R. Rep. 102, 71st Cong., 1st sess., p. 2, quoting from the Attorney General's letter that proposed the legislation:

"The bill as drafted is substantially the same as the ones authorizing two new correctional institutions. It has, however, one section which provides a board of examiners to pass on all cases to be sent to the hospital for defective delinquents. The reason for this provision was the feeling that no person, even though he is in prison, ought to be stigmatized as insane except by formal proceedings of a qualified board. Moreover, it was felt some such board was desirable to make certain that only cases really demanding special treatment would be transferred to the hospital for defective delinquents.

"The bill also has a section which makes it the duty of the prison officials to see that no person who is suffering from a mental disease is turned loose upon the public without first trying to get the particular State concerned to take him in charge. At present, if the officials believe a convict whose sentence has expired is still insane, they continue to hold him unless his release is sought by one of his friends through legal process. In such cases they have no alternative but to release him as their jurisdiction ended with the expiration of the sentence. The proposed provision would authorize a definite procedure for handling such cases."

The "without deduction" clause was construed by Judge (later Mr. Justice) Whittaker in *Weldon* v. *Steele*, 125 F. Supp. 667 (W.D. Mo.).

Section 4242 (*infra*, p. 11a) provides for retransfer to other penal or correctional institution upon restoration of sanity, while § 4243 (*ibid.*) covers delivery to state authorities on expiration of sentence if at that date the prisoner "is still insane or a menace to the public." Neither section contemplates what was done here, namely, transfer for State prosecution of a prisoner who is under a subsisting determination of insanity; and the scheme of the several sections comprising Chapter 313 of Title 18 forbids such an act by clearest implication.

Section 4247 (*infra*, pp. 14a-15a) provides an alternative procedure where the prisoner is still insane upon expiration of his sentence, while Section 4248 (*infra*, p. 15a) deals with the termination of custody by release or transfer in respect of a prisoner committed under § 4247; neither is applicable here.[4]

Without laboring the point, it is petitioner's position that the Attorney General may not lawfully transfer to a State for prosecution a Federal prisoner held under a § 4241 determination that he is of unsound mind, and that this result follows from the statutory scheme. Moreover, to the extent that the statutes are less clear than we think they are, the same result must follow under the principle that statutes are to be construed to avoid even raising important constitutional questions. *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127, 137-138; *Machinists* v. *Street*, 367 U.S. 740, 749-750; *Lynch* v. *Overholser*, 369 U.S. 705, 710-711. It being clear that the conviction of a legally incompetent

[4] Sections 4244-4248 were held constitutional in *Greenwood* v. *United States*, 350 U.S. 366 (1955). More recently, however, §§ 4244 and 4246 have been ruled unconstitutional by a district court. *United States* v. *Jackson*, N.D. Calif., No. 41713 Crim., Nov. 13, 1969, Zirpoli, D.J., not yet reported.

person offends against due process of law (*Pate* v. *Robinson,* 383 U.S. 375, 378), it necessarily follows that a similar violation is involved in turning over such a person for prosecution; and since the prisoner here transferred was under a statutory determination that he was indeed of unsound mind, the statutes should not be construed to legalize such a transfer for purposes of prosecution even if the matter were otherwise in doubt.

Second. It is of course well settled, and we do not seek to question the rule even glancingly, that the courts will not inquire how a prisoner came into the hands of the convicting State; forcible abduction, kidnaping, irregularities in interstate rendition are all immaterial to the validity of any conviction that follows such acts. In this Court that rule, first laid down in *Ker* v. *Illinois,* 119 U.S. 436, was last restated by a unanimous bench in *Frisbie* v. *Collins,* 342 U.S. 519.

But, in those cases as in all the others here on the same point (*Mahon* v. *Justice,* 127 U.S. 700; *Cook* v. *Hart,* 146 U.S. 183; *Lascelles* v. *Georgia,* 148 U.S. 537; *Ex parte Johnson,* 167 U.S. 120; *Pettibone* v. *Nichols,* 203 U.S. 192), the prisoner was, as stated in the last decision cited (203 U.S. at 215) "held in actual custody" by the State.

That was not the fact here; the distinguishing feature of this case is that the present petitioner remained in Federal custody throughout the State proceedings and was never transferred to State custody.

1. He was in actual Federal custody at the Medical Center in Springfield when the Director there was ordered to honor New York's writ of habeas corpus *ad prosequendum* (Appendix E, *infra,* p. 19a).

2. Then, to quote the opinion below (*infra,* p. 3a), "He was not actually released but was housed under federal authority as a federal prisoner and accompanied by a federal marshal at all pertinent times."

3. Continuing to quote from the opinion below (*ibid.*), "Upon conclusion of the New York trial, he was returned to the Medical Center at Springfield." (Then, and only then, was he decertified; *supra*, p. 3.)

We submit that in those circumstances the jurisdiction of the State never attached, any more than State jurisdiction can attach to a prisoner (*Ableman* v. *Booth*, 21 How. 506) or a soldier (*Tarble's Case*, 13 Wall. 397) of the United States. Such jurisdiction cannot exist or commence or be exercised until and unless the prisoner in question is actually and factually released from Federal to State custody. Here, as the precise language of the opinion below makes crystal clear (*infra*, p. 3a), no such release ever took place.

Third. The basic habeas corpus statute (28 U.S.C. § 2243; *infra* at p. 16a) directs the court to "dispose of the matter as law and justice require." And habeas corpus, it has twice in recent years been emphasized by this Court, "is not now and never has been a static, narrow, formalistic remedy." *Jones* v. *Cunningham*, 371 U.S. 236, 243; *Peyton* v. *Rowe*, 391 U.S. 54, 66.

There is accordingly no impediment to an ultimate declaration in the present habeas corpus proceeding that the Attorney General acted otherwise than in accordance with law in turning over to a State for prosecution a Federal prisoner whose § 4241 certification of unsound mind was then in effect unrevoked. Nor is there any obstacle to the further declaration that, since such prisoner was never in fact released to the actual custody of the State, the State lacked jurisdiction to convict him, with the result that its action purporting to do so while he remained in actual and continuing Federal custody was and remains a nullity.

It cannot be supposed that, if this Court should so declare, the New York courts would disregard its declaration. In any event, further review here is available in the unlikely event that those courts should nonetheless undertake to hold the contrary.

Fourth. Finally, we recognize that this is truly a case of first impression. But that circumstance should not preclude review. In the converse situation, where the Federal prisoner sought rather than resisted trial by the State, on the footing of his constitutional entitlement to a speedy trial, the decision here was also a case of first impression. *Smith* v. *Hooey,* 393 U.S. 374, 384.

Moreover, and in any event, whenever any person has been dealt with as this petitioner has been, transferred by the Attorney General while under certification of insanity for State prosecution, and yet never actually released to State custody, but instead kept as it were in a Federal cocoon while the State subjected him to an additional (and indeed savage) sentence of 33 to 40 years—whenever, as we say, a single human being has been so treated, this Court should afford redress. Failure to grant review here would not only condone injustice to an individual, it would ignore a grave impropriety in the Federal-State relationships that should govern law enforcement.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

FRANK A. LOPEZ,
44 Court Street,
Brooklyn, N. Y. 11201,
Of Counsel.

JANUARY 1970.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 13 1970
JOHN F. DAVIS, CLERK

No. 1071

In the Supreme Court of the United States

OCTOBER TERM, 1969

HAROLD KONIGSBERG, PETITIONER

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER AND JOHN N. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1071

HAROLD KONIGSBERG, PETITIONER

v.

PASQUALE J. CICCONE, M.D., MYRL E. ALEXANDER AND JOHN N. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In November, 1965, while he was serving a ten year sentence in federal prison, petitioner was transferred to the Federal Medical Center at Springfield, Missouri. He was certified as insane, pursuant to 18 U.S.C. 4241, on April 5, 1966. In September, 1966, the Attorney General authorized his removal to New York for trial in state court on a writ of habeas corpus *ad prosequendum* (App. E). He was housed in New York as a federal prisoner under fed-

eral authority, and was taken to the state trial by a federal marshal. Following his conviction and sentencing in New York, he was returned to Springfield. On August 16, 1967 he was decertified, but was kept at Springfield, as the required medical care and treatment was not available in any other existing penal institution (Pet. 3).

On August 2, 1967, petitioner filed a petition for a writ of habeas corpus in the Western District of Missouri challenging the conditions of his confinement. He also asked the district court to declare his New York sentence void on the ground that it was illegal for the federal government to assist the state by making him available for trial under 18 U.S.C. 4085 while he was certified as insane under 18 U.S.C. 4241. The district court (285 F. Supp. 585) and the court of appeals (417 F. 2d 161) declined to grant such relief.

The only relief petitioner now seeks in challenging his federal custody on habeas corpus, vacation of the New York judgment, is manifestly inappropriate. No decision supports the attempt by petitioner to challenge, by habeas corpus directed to his federal custodian, a state conviction presently on appeal to the state court, and which petitioner has not yet begun to serve.

In any event, petitioner's transfer to New York was authorized by 18 U.S.C. 4085 and not prohibited by 18 U.S.C. 4241. In providing that an insane federal prisoner may be kept in an authorized institution until restored to sanity or until the expiration of his sentence, Section 4241 is designed to protect

both the deranged prisoner and the general prison population. It does not prevent the Attorney General from determining that a certified prisoner may temporarily be transferred to other federal custody for a short period of time. Moreover, mental incompetence is neither a fixed and immutable state, nor a necessary consequence of insanity. Petitioner's certification as insane in April 1966 does not prove that he was incompetent to stand trial at the time of his transfer, October 1966. *McIntosh* v. *United States*, 176 F. 2d 514 (C.A. 8).[1] Petitioner's sanity and competency at the time of trial was a matter to be determined by the New York trial court, not by federal officials. See *Gunther* v. *United States*, 215 F. 2d 493 (C.A.D.C.). The government could reasonably presume that petitioner's constitutional rights would be protected at the trial, and petitioner "* * * should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other * * *." *Ponzi* v. *Fessenden*, 258 U.S. 254, 260.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

---

[1] Petitioner was found competent by the state court and was later decertified by federal authorities.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 376055 486